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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 696

ANONYMOUS (No. 1),

Petitioner,

versus

HON. WALTER R. HART, a Justice of the Supreme Court of the State of New York; HON. GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, and DENIS M. HURLEY, counsel for the Judicial Inquiry.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

Petitioner prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered on July 21, 1958. That Court is possessed of the record required for review by this Court. The Court of Appeals, on November 13, 1958,

by final order refused to review the decision of the Appellate Division, Second Department.

Opinions Below

There are no opinions by either the Court of Appeals or the Appellate Division. There are printed in Appendix B, infra, the final order of the Appellate Division dismissing the petition and denying leave to appeal; also the order of the Court of Appeals denying leave to appeal.

Jurisdiction

Petitioner, on June 18th, 1959, instituted a proceeding in the Appellate Division against Hon. Walter R. Hart, a justice of the Supreme Court of the State of New York to compel him to perform a duty specifically enjoined by law, to wit, to decide a motion argued and submitted to him for a decision as a justice sitting at Special Term, Part I, of the Supreme Court, Kings County, pursuant to law.

Section 1287 of Article 78 of the Civil Practice Act (Gilbert Bliss, Civil Practice Act of New York), provides that if the petition be directed against a justice of the Supreme Court, the application shall be made to the Appellate Division in the first instance.

The original petition under Article 78, made the claim that appellant was denied due process of law under the Fourteenth Amendment, Federal Constitution, pleading:

> "That the said order of the Appellate Division, dated May 29, 1958, also insofar as it restricts

the petitioner and the other parties moving to vacate subpoenas duces tecum to the Additional Special Term for such relief violates the constitutional rights of the petitioner under the State Constitution and the due process clause of the 14th Amendment of the Federal Constitution."

And also:

"That by its order dated May 29, 1958, amending its order of March 5, 1958 nunc pro tunc, the Appellate Division, Second Department, has sought by indirection to oust the Supreme Court of its conceded jurisdiction to entertain and decide petitioner's said motion and further, has illegally nullified the order and decision of Mr. Justice Hart, dated April 28 and April 29, 1958, denying the cross motion of the respondents therein to refer the motion to quash the subpoena duces tecum to the Additional Special Term, thus depriving petitioner of due process of law and his constitutional rights."

By a final order dated July 21, 1958 the Appellate Division dismissed the petition without opinion.

By order dated October 6, 1958 leave to appeal to the Court of Appeals was denied by the Appellate Division.

By order dated November 13, 1958 leave to appeal to the Court of appeals was denied by that court.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

Questions Presented

Whether Fourteenth Amendment, Federal Constitution, due process of law was denied to petitioner by the refusal of Mr. Justice Hart to render a decision on petitioner's motion to vacate the subpoena duces tecum which had been regularly argued and submitted to him for determination in accordance with the law of the State of New York.

Whether the final order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department dismissing the petitioner's petition denied to the petitioner such due process.

Whether Fourteenth Amendment, Federal Constitution, due process of law was denied to petitioner by the refusal of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, to transfer petitioner's Article 78 proceeding to another department for determination.

Whether Fourteenth Amendment, Federal Constitution, due process of law would be denied to petitioner by the transfer of the motion to vacate the subpoena duces tecum to the Judicial Inquiry for determination.

Whether equal protection of the laws under the Fourteenth Amendment, Federal Constitution, would be denied to the petitioner by the transfer of the motion to vacate the subpoena duces tecum to the Judicial Inquiry for determination.

Statutes Involved

The statutory provisions involved, printed in Appendix A, infra, are as follows:

Constitution of the State of New York (Judiciary) Article 6, Sections 1, 2 and 19 (McKinney's Consolidated Laws of New York Annotated, Book 2, Part 2);

Judiciary Law of the State of New York, Section 90, Subdivision 10 (McKinney's Consolidated Laws of New York Annotated, Book 29);

Judiciary Law of the State of New York, Section 4 (McKinney's Consolidated Laws of New York Annotated, Book 29);

New York State Civil Practice Act, Section 1287.

Statement

The petitioner is an attorney at law having been duly admitted to practice in the Courts of the State of New York by the Appellate Division, Second Department, at the June 1919 Term.

By order dated January 21, 1957, which was amended by order dated February 11, 1957 the Appellate Division, Second Judicial Department, directed a judicial inquiry and investigation with respect to certain alleged improper practices and abuses by attorneys in Kings County and by persons acting in concert with them.

The Honorable George A. Arkwright, a justice of the Supreme Court, Kings County, was designated with "full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records."

The said order also, "ORDERED, that, for the purpose of protecting the reputation of innocent persons, the said inquiry and investigation shall be conducted in private, pursuant to the provisions of the Judiciary Law (Section 90, subdivision 10), that all the facts, testimony and information adduced, and all papers relating to this inquiry and investigation, except this order, shall be sealed and be deemed confidential; and that none of such facts, testimony and information and none of the papers and proceedings herein, except this order, shall be made public or otherwise divulged until the further order of this Court, and it is further

ORDERED, that upon the conclusion of said inquiry and investigation the said Justice shall make and file with this court his report setting forth his proceedings, his findings and his recommendations."

On or about November 15, 1957 the petitioner received in the mail a subpoena duces tecum addressed to him issued by the said Judicial Inquiry directing the production before it of various books, papers and documents enumerated in the said subpoena.

On or about February 13, 1958 the petitioner applied by order to show cause to the Appellate Division, Second Judicial Department, *sitting en banc as a Special Term Court of original jurisdiction* for an order vacating and setting aside the said subpoena

duces tecum upon the ground that it constituted an abuse of process and a violation of the constitutional rights of the petitioner and an illegal search and seizure in violation of the provisions of Section 12, Article I of the Constitution of the State of New York and the Fourth Amendment of the Constitution of the United States.

Counsel for the Judicial Inquiry made a cross motion for an order dismissing the petitioner's application upon the ground that the Appellate Division lacked jurisdiction to hear and determine the said application in the first instance.

On March 5, 1958 the Appellate Division sitting en banc as a Special Term, while admitting that it possessed original jurisdiction to entertain the motion, nevertheless granted the said cross motion and dismissed the petitioner's application without prejudice to the petitioner's right, if so advised, to renew the said application in the Supreme Court (See decision and order of Appellate Division dated March 5, 1957; Exhibits "F" and "G" in record of Appellate Division accompanying this petition for certiorari).

Thereafter, by order to show cause dated March 22, 1958 the petitioner applied at Special Term, Part I of the Supreme Court, Kings County, for an order vacating the said subpoena duces tecum upon the grounds urged in the original application before the Appellate Division.

Prior to the return date of the said application the Hon. George A. Arkwright and Denis M. Hurley who were designated as respondents in the said proceeding

applied by cross notice of motion for an order transferring the petitioner's application to the Additional Special Term presided over by the Hon. George A. Arkwright in the conduct of the Judicial Inquiry.

On April 7, 1958 the petitioner's said application and the said cross motion regularly came on to be heard before Mr. Justice Walter R. Hart who was presiding at Special Term, Part I of the Supreme Court, Kings County, pursuant to designation by the Appellate Division, Second Department.

At that time the cross motion for an order transferring the petitioner's application to the Additional Special Term was orally argued before Mr. Justice Hart and a stenographic transcript of the said argument was made. (See transcript Exhibit "M" in record of Appellate Division accompanying this petition.)

It was conceded upon the said argument that (1) Special Term, Part I had jurisdiction of the petitioner's said application, (2) that only questions of law were involved therein and (3) that the respondents were not entitled to have the said application transferred to the Additional Special Term as a matter of right.

At the conclusion of the said oral argument the cross motion was denied by Mr. Justice Hart by oral decision. Thereafter a written opinion was filed by the said Justice and an order thereon duly entered and filed. (See opinion and order of Mr. Justice Hart, Exhibits "N" and "O" in record of Appellate Division accompanying this petition).

After the denial of the said cross motion the petitioner's application for an order vacating the subpoena duces tecum was submitted by both sides to Mr. Justice Hart for decision.

An order having been entered denying the aforesaid cross motion a notice of appeal therefrom to the Appellate Division, Second Department, was served by counsel for the respondents.

The petitioner thereupon moved in the said Appellate Division for an order dismissing the said appeal upon the ground that the order of Mr. Justice Hart denying the respondent's aforesaid cross motion was not appealable.

By order dated May 29, 1958 the Appellate Division, Second Department, dismissed the said appeal. (See order of Appellate Division same date, Exhibit "U" in record of Appellate Division accompanying this petition.)

Astonishingly enough the Appellate Division on the same day in order to accomplish by indirection what it could not accomplish directly, gratuitously undertook, on its own motion, to amend its prior order of March 5, 1958 nunc pro tunc so that it would read:

> "that the petitioner's application to vacate the said subpoena duces tecum be denied without prejudice to the petitioner's right, if so advised, to renew the said application at the Additional Special Term." (See opinion of Appellate Division and its order dated May 29, 1958; Exhibits "T" and "V" in record of Appellate Division accompanying this petition).

On or about June 9, 1958 at a conference duly called by Mr. Justice Hart the petitioner was informed that in view of the said nunc pro tunc amendment of the order of the Appellate Division, he, Mr. Justice Hart, was of the opinion that he was required to transfer the petitioner's application for an order vacating the said subpoena duces tecum to the Additional Special Term despite his order of April 29, 1958 denying the cross motion for such relief which had not been vacated or set aside.

Petitioner then requested Mr. Justice Hart to render a decision upon the application to vacate the subpoena duces tecum which had duly and regularly been submitted to him for decision but he refused to do so.

A proceeding was then instituted pursuant to the provisions of Article 78 of the Civil Practice Act for an order in the nature of mandamus directing Mr. Justice Hart to render a decision upon the said application.

Since the petition was directed against a Justice of the Supreme Court, Kings County, the application was made in the Appellate Division, Second Judicial Department, as provided by law.

By order of the Appellate Division the Hon. George A. Arkwright and Denis M. Hurley were permitted to intervene in the said proceeding.

An answer submitted by Mr. Justice Hart admitted all of the material allegations of the petition.

By order dated July 21, 1958 the Appellate Division dismissed the petition without opinion.

By order dated October 6, 1958 leave to appeal to the Court of Appeals was denied by the Appellate Division.

Thereafter by order dated November 13, 1958, the Court of Appeals refused to review the decision of the Appellate Division, Second Department. (These orders are printed in Appendix B, infra).

Reasons for Granting the Writ

The refusal of Mr. Justice Hart to render a decision on the petitioner's motion for an order vacating the subpoena duces tecum constitutes a denial of due process under the Fourteenth Amendment of the Federal Constitution.

Mr. Justice Hart, a justice of the Supreme Court of the State of New York, was regularly assigned by the Appellate Division, Second Department, to Special Term, Part I of the Supreme Court, Kings County, for the hearing of contested motions.

When petitioner's motion for an order vacating the subpoena duces tecum came on before Mr. Justice Hart it was conceded by counsel for the Judicial Inquiry that:

1. Special Term had jurisdiction of the motion.
2. Only questions of law were involved; and
3. The transfer of the motion to the Additional Special Term was not a matter of right.

Under the circumstances the refusal of Mr. Justice Hart to render a decision on the motion constituted a denial of due process to the petitioner.

The Supreme Court, Kings County, could not be summarily ousted of jurisdiction with respect to the petitioner's motion by the attempted nunc pro tunc amendment by the Appellate Division of its order made in an entirely different and unrelated proceeding to which Mr. Justice Hart was not a party.

The cross motion of counsel for the Judicial Inquiry for an order transferring the said motion to the Additional Special Term had been specifically denied by Mr. Justice Hart.

An appeal taken from the order of denial had been dismissed by the Appellate Division, Second Department.

In the face of the order denying the cross motion to transfer petitioner's motion to the Additional Special Term the attempt by the Appellate Division to accomplish the same result by indirection constituted a violation of due process under the Federal Constitution.

The petitioner had the constitutional right to maintain the proceeding to vacate the subpoena duces tecum in the Supreme Court, Kings County, and even if the Appellate Division in its original order had sought to restrict the petitioner to the Additional Special Term it could not have done so.

In *People ex rel. Sherman* v. *Adjourned Special Term*, 206 App. Div. 799, it was said:

> "The Extraordinary Special and Trial Terms of the Supreme Court convened by the Governor of the State are merely additional to those terms of the court already designated to be held under

the provisions of the Judiciary article of the Constitution. The Extraordinary Term created under the Judiciary Law do not exclude the Special and Trial Terms created by the Constitution from exercising jurisdiction already delegated to such terms. (*People ex rel. Newton* v. *Special Term, Part I*, 193 App. Div. 463.) The court is of the unanimous opinion that the motion to inspect the minutes of the grand jury could be made at any Special Term in the Ninth Judicial District, or at the Extraordinary Term. The majority of the court is of the opinion that an adjourned Special Term may consider new business first noticed before such adjourned term. (Judiciary Law, Sections 7, 148)."

In *Niagara Falls Power Co.* v. *Halpin*, 267 App. Div. 236, the Court said:

"Appellant has come into the Supreme Court of the State of New York, a court to which it has a legal and a constitutional right to come, not as a matter of favor but as a matter of right, a court having general jurisdiction in both law and equity. The jurisdiction of that court is unlimited, unqualified, and coextensive with the boundaries of the State. The Legislature has no power to deprive it of jurisdiction or to limit or qualify the same, although it may grant concurrent jurisdiction to other courts. The Supreme Court has jurisdiction to hear and determine any justiciable question of which the common-law or chancery courts of England would have had cognizance, subject only to terrotorial limitations, such jurisdiction being broad enough to embrace all causes of action and all persons within the State's juris-

diction. The door of that court should never be closed to any suitor who has a grievance which should be redressed on the spurious pretext that by going hat in hand to some administrative tribunal he may possibly be accorded a hearing."

Since the Special Term concededly had jurisdiction of the petitioner's application in which only questions of law were involved and since it was conceded that a transfer of the said application to the Additional Special Term was not a matter of right the petitioner may not be deprived of the right to have the said application determined by the respondent.

The transfer of petitioner's motion to vacate the subpoena duces tecum to the Judicial Inquiry would constitute a denial of the equal protection of the laws.

An application to vacate the subpoena duces tecum is a special proceeding which terminates in a final order from which an appeal may be taken as a matter of right:

Matter of Inter-City Associates Inc., 308 N. Y. 1044;
Matter of Alexander v. *N. Y. State Comm.*, 306 N. Y. 421;
Matter of Weil v. *N. Y. State Comm.*, 283 App. Div. 808.

Therefore, an order made by Mr. Justice Hart upon his determination of the petitioner's application would be appealable.

However, the Appellate Division, Second Department, has expressly held that since the Judicial In-

quiry directed by it is neither an action civil or criminal nor a special proceeding its orders are not appealable (*Matter of C Anonymous*, Oct. 7, 1958).

It has uniformly been held that a preliminary investigation such as this Judicial Inquiry where the proceedings are conducted in secrecy and persons appearing before it are deprived of the right to be represented by counsel is not a sitting of a court within the meaning of Section 4 of the Judiciary Law (*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 479; *Matter of Richardson*, 247 N. Y. 401, 407; *Matter of State Industrial Comm.*, 224 N. Y. 13; *People ex rel. Bender* v. *Milliken*, 185 N. Y. 35, 39; *Matter of Mitchel* v. *Cropsey*, 177 App. Div. 663).

Consequently, if the petitioner were relegated to the Judicial Inquiry for the making of his motion to vacate the subpoena duces tecum the order entered upon the decision of the motion would be final and no appeal could be taken therefrom.

In such circumstances the petitioner would be denied the equal protection of the laws under the Fourteenth Amendment to the Federal Constitution.

The Justice conducting the Judicial Inquiry would be disqualified to determine the motion to vacate the subpoena duces tecum.

The order of the Appellate Division directing the Judicial Inquiry, assigned to the Justice designated to conduct the Inquiry, dual and conflicting roles.

The said Justice was appointed investigator and prosecutor to conduct the inquiry and also to adjudi-

cate in a judicial capacity all matters in difference between himself an investigator and those persons appearing before him.

The subpoena duces tecum sought to be vacated by the petitioner was issued by the said Justice or under his direction.

In undertaking to hear the petitioner's application the said justice would be required to pass upon the validity of his own act in issuing the subpoena.

To permit the justice conducting the Judicial Inquiry to sit in review of his own act would constitute a denial of due process under the Fourteenth Amendment to the Federal Constitution.

Matter of Murchison, 349 U. S. 133;
Matters of Cross & Brown Co., 4 App. Div. 2d 501;
People ex rel Todd v. *Steinbrink*, 249 App. Div. 760.

For the same reason that a transfer of the petitioner's motion to vacate the subpoena duces tecum to the Judicial Inquiry would constitute a violation of due process, the refusal of the Appellate Division, Second Department, to transfer the petitioner's Article 78 proceeding to another department constituted a violation of due process.

The Article 78 proceeding was required by law to be instituted in the Appellate Division, Second Department (Civil Practice Act, Sec. 1287).

In order for the Appellate Division to determine whether Mr. Justice Hart had properly refused to

render a decision on the petitioner's motion it was necessary to determine whether its own nunc pro tunc order was valid and effective.

The said nunc pro tunc order had been made by the Justices of the Appellate Division sitting en banc as a Special Term court of original jurisdiction.

Section 19 of Article 6 of the New York State Constitution provides that no judge or justice shall sit in any appellate court in review of a decision made by him or by any court of which he was at the time a sitting member.

Consequently when the Appellate Division undertook to determine petitioner's Article 78 Proceeding it undertook at least indirectly to review its own order.

This constituted a violation of due process.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: February 9, 1959

Respectfully submitted,

DAVID F. PRICE
Counsel for Petitioner
66 Court Street
Brooklyn, New York

APPENDIX A

(Statutory Provisions Cited and Quoted)

The source of the jurisdiction of the Supreme Court of the State of New York is to be found in Article 6, Section 1, of the Constitution of the State of New York, the pertinent part of which reads:

> "Section 1. The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or hereafter may be prescribed by law not inconsistent with this article."

The State Constitution, by Section 2 of Article 6, conferred upon the justices of the Appellate Division the power to create the terms and to assign the justices of the Supreme Court to the various terms. Insofar as it is relevant it reads:

> "The justices of the Appellate Division in each department shall have power to fix the times and places for holding special and trial terms of the Supreme Court held therein and to assign the justices in the departments to hold such terms; or to make rules therefore."

The pertinent part of Article 6, Section 19 of the New York State Constitution referred to in this petition provides as follows:

> "* * *. No judge or justice shall sit in any appellate court in review of a decision made by him or by any court of which he was at the time a sitting member."

The pertinent section of the Judiciary Law of the State of New York, Article 2, provides in Section 4 as follows:

"Sec. 4. Sittings of courts to be public

The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court: As amended L. 1945, c. 649, Sec. 3, eff. April 9, 1945."

The New York Civil Practice Act, Art. 78 entitled PROCEEDING AGAINST A BODY OR OFFICER, provides in Sec. 1287 as follows:

§ 1287. Where proceeding to be brought. The petitioner shall apply for relief at a special term of the supreme court held within the judicial district embracing the county where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or wherein the proceedings are brought or taken in the course of which the matter sought to be restrained originated, as the case may be, or wherein it is alleged in the petition that the material facts otherwise took place; or wherein the principal office of the respondent is located. The special term at which relief is applied for may, in the exercise of its discretion, transfer the proceeding to the county wherein the principal office of the respondent is located. If

the petition be directed against a justice of the supreme court or a judge of the county court or the court of general sessions, the application shall be made to the appellate division of the judicial department embracing the county wherein the action is triable or the special proceeding is brought, in the course of which the matter sought to be enforced or restrained, as the case may be, originated, unless a term of the appellate division of said department is not in session, in which case the application may be made to the appellate division in an adjoining judicial department; and except that the petitioner may apply to any court or judge expressly authorized by statute to grant relief. If the petition be directed against the regents of the university of the state of New York, the commissioner of education, the state tax commission, the public service commission, the comptroller, the department of agriculture and markets or the water power and control commission, the application shall be made to a special term of the supreme court in the third judicial district.

Subdivision 10, Section 90, Judiciary Law of the State of New York, which may be found in McKinney's Consolidated Laws of New York, Annotated, Book 29, reads, as follows:

"SEC. 90. *Admission to and removal from practice by appellate division*

* * * * *

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor

at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby, or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

APPENDIX B

(Copies of Orders Below)

Order Dismissing Petition

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 21st day of July, 1958.

Present—Hon. Gerald Nolan,
Presiding Justice.

" Henry G. Wenzel, Jr.,
" Charles E. Murphy,
" James T. Hallinan,
" Philip M. Kleinfeld,
Justices.

In the Matter of the Application of Anonymous (No. 1),

Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act, compelling the Hon. Walter R. Hart, a Justice of the Supreme Court of the State of New York, to perform a duty specifically enjoined by law, to wit, to decide a motion argued and submitted to him for decision as a Justice sitting at Special Term, Part I, of the Supreme Court, Kings County, pursuant to designation by the Appellate Division of the Supreme Court, Second Judicial Department,

Respondent;

Hon. George A. Arkwright, a Justice of the Supreme Court of the State of New York, and Denis M. Hurley, counsel for the Judicial Inquiry,

Intervenors.

An order having been made by this court on January 21st, 1957, directing a judicial inquiry and investigation as to the matters set forth in the petition of the Brooklyn Bar Association, and having further directed that such inquiry and investigation be conducted by the Honorable George A. Arkwright, a Justice of the Supreme Court, Second Judicial District, and having designated Denis M. Hurley, Esq., an attorney and counselor at law to aid said justice in the conduct of such inquiry and investigation; and a proceeding having been instituted by petitioner (Anonymous No. 1), pursuant to Article 78 of the Civil Practice Act, by petition verified the 18th day of June, 1958, for an order restraining respondent, Hon. Walter R. Hart, Justice of the Supreme Court, from referring the petitioner's motion to vacate a subpoena duces tecum issued by the Judicial Inquiry, to the Additional Special Term of the Supreme Court, Kings County, for a decision and to direct said respondent to render a decision upon the said motion, and the said proceeding under Article 78 of the Civil Practice Act having come on to be heard before this court by an order to show cause dated June 18th, 1958.

Now on reading and filing the petition verified June 18th, 1958, the order to show cause dated June 18th, 1958, the memorandum of petitioner (Anonymous No. 1), the answer of respondent, the answer of the intervenors, the brief of the intervenors, and all the papers filed herein, and the said proceeding having been submitted by Mr. David F. Price of Counsel for petitioner (Anonymous No. 1), and submitted by Mr. Denis M. Hurley (Michael Caputo of Counsel), for intervenors; and due deliberation having been had thereon:

If is Ordered that the petition of Anonymous No. 1, be and the same hereby is dismissed, with $50 costs and disbursements.

Enter:

JOHN J. CALLAHAN
Clerk.

NOTICE OF ENTRY

Supreme Court of the State of New York,
Appellate Division,
Second Judicial Department,
Clerk's Office, Borough of Brooklyn, N. Y.

I, JOHN J. CALLAHAN, Clerk of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said Court upon the motion in the above entitled proceeding, and entered in my office on the 21st of July, 1958.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 9th day of September, 1958.

JOHN J. CALLAHAN
Clerk.

(Seal)

Order on Motion for Leave to Appeal to the Court of Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 6th day of October, 1958.

Present—Hon. Henry G. Wenzel, Jr.,
Acting Presiding Justice

" George J. Beldock,
" Charles E. Murphy,
" James T. Hallinan,
" Philip M. Kleinfeld,
Justices.

In the Matter of the Application of Anonymous (No. 1),

Petitioner,

for an order pursuant to Article 78 of the Civil Practice Act, compelling the Hon. Walter R. Hart, a Justice of the Supreme Court of the State of New York, to perform a duty specifically enjoined by law, to wit, to decide a motion argued and submitted to him for decision as a Justice sitting at Special Term, Part I, of the Supreme Court, Kings County, pursuant to designation by the Appellate Division of the Supreme Court, Second Judicial Department,

Respondent:

Hon. George A. Arkwright, a Justice of the Supreme Court of the State of New York, and Denis M. Hurley, counsel for the Judicial Inquiry,

Intervenors

(No. 1024)

The above named petitioner (Anonymous No. 1), in this proceeding having made a motion for leave to appeal to the Court of Appeals from the order of this Court entered July 21, 1958, dismissing the petition, herein, and the motion having been duly submitted:

Now on reading and filing the papers in support of and in opposition to said motion; and all the papers upon which the proceeding was heard; and due deliberation having been had thereon:

It is Ordered that the said motion for leave to appeal to the Court of Appeals be and the same hereby is denied.

Enter:

JOHN J. CALLAHAN
Clerk.

NOTICE OF ENTRY

Supreme Court of the State of New York,
Appellate Division,
Second Judicial Department,
Clerk's Office, Borough of Brooklyn, N. Y.

I, JOHN J. CALLAHAN, Clerk of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said Court upon the motion in the above entitled proceeding, and entered in my office on the 6th day of October, 1958.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 8th day of October, 1958.

JOHN J. CALLAHAN
Clerk.

(Seal)

Order of Court of Appeals Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the thirteenth day of November A. D. 1958.

Present, HON. ALBERT CONWAY,
Chief Judge, presiding.

Mo. No. 548

In the Matter of the Application of ANONYMOUS (No. 1),

Appellant,

for an order &c. compelling HON. WALTER R. HART, a Justice of the Supreme Court of the State of New York, to perform a duty specifically enjoined by law, &c.,

Respondent,

HON. GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, & ano., &c.,

Intervenor-Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

SEAL

GEARON KIMBALL,
Deputy Clerk

ILE COPY

Office Supreme Court, U.S.
FILED
MAR 11 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 696

ANONYMOUS (NO. 1),

Petitioner,

versus

HON. WALTER R. HART, a Justice of the Supreme Court of the State of New York; HON. GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, and DENIS M. HURLEY, counsel for the Judicial Inquiry,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENIS M. HURLEY,
Attorney for Respondents,
Office and Post Office Address,
Borough Hall,
Brooklyn 1, N. Y.

MICHAEL A. CASTALDI,
of Counsel,

ZEVIE B. SCHIZER,
With them on the Brief.

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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE RELIEF SOUGHT BY PETITIONER

and

THE DECISIONS BELOW

In our Statement of the Case, *infra*, we shall recite the material facts and the sequence of the extensive litigation in the State Courts;—involving in the ultimate nothing more than a claim by petitioner that he has a constitutional right to have his motion to quash a certain subpoena determined at a particular *part* or *term* of the Supreme Court of the State of New York different than the *part* or *term* of the Supreme Court designated therefor by the Appellate Division of the Supreme Court.

We point out here that petitioner's motion to quash the subpoena has never reached the stage of determination on the merits. The maze of litigation thus far has centered solely on a preliminary procedural question as to the proper judicial forum to decide petitioner's motion.

During the course of the litigation the Appellate Division rendered an opinion herein (6 App. Div. 2d 723) that the motion to quash the subpoena should be addressed to the "Additional Special Term of the Supreme Court" which had been theretofore appointed or designated by the Appellate Division. Alleging that such direction of the Appellate Division was an invasion of his rights under the due process clause of the Fourteenth Amendment, petitioner instituted a proceeding under Article 78 of the Civil Practice Act of the State of New York. The relief sought by petitioner in that proceeding was an order directing the Hon. Walter R. Hart as a Justice of the Supreme Court, Kings County, to render a decision upon petitioner's motion at a "Special Term, Part I of the Supreme Court, Kings County, upon the ground that the said duty is specially enjoined by law upon the respondent." By decision (6 App. Div. 2d 894) and order entered thereon, dated July 21 1958, petitioner's application and petition in the Article 78 proceeding were unanimously dismissed. By order dated October 6, 1958, the Appellate Division denied leave to petitioner to appeal to the Court of Appeals (N. Y. Law Journal, October 7, 1958, p. 14, col. 4).

By order dated November 13, 1958, the Court of Appeals denied petitioner's motion for leave to appeal to that court (5 N. Y. 2d 708).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

The questions presented are:

(1) Under the circumstances of this case, is the petitioner possessed of any constitutional right to choose a particular term or part of the State Supreme Court to pass upon a motion to quash a subpoena? Is the petitioner denied either the equal protection of the laws or due process of law under the Fourteenth Amendment by a requirement of the Appellate Division that a motion to quash the subpoena here involved shall be addressed to the "Additional Special Term of the Supreme Court" appointed by the Appellate Division?

(2) Is the determination of the courts below a "final judgment" within the meaning of Title 28 U. S. C. § 1257(3)? In any event, does the case at this juncture present any constitutional question that is ripe for review by this court?

STATEMENT OF THE CASE

The judicial inquiry ordered by the Appellate Division; the relevant provisions of the order of the Appellate Division.

By order dated January 21, 1957, as amended by order dated February 11, 1957,* the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, directed that a judicial inquiry be directed

*The full text of the order and the amending order, designated Exhibits A and B, respectively, comprise part of the record of the Appellate Division herein.

with respect, *inter alia*, to alleged improper and unethical practices by attorneys and by persons acting in concert with them.

For the purpose of conducting the inquiry, the order provides for the appointment of "An Additional Special Term of the Supreme Court, in and for the County of Kings" and that "Mr. Justice George A. Arkwright," be and he hereby is assigned to hold such Additional Special Term." The order further provides for the appointment of Denis M. Hurley, Esq., an attorney designated by the Brooklyn Bar Association, to aid Mr. Justice Arkwright in the conduct of the inquiry.

Under the terms of the order, the justice presiding at the Additional Special Term is vested "with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records."

The subpoena issued to petitioner; the ensuing litigation.

By subpoena dated November 15, 1957, issued by the respondents Arkwright and Hurley, the petitioner, an attorney-at-law, was directed to appear with various of his records at an "Additional Special Term of the Supreme Court for the County of Kings" on November 20, 1957 (Exhibit W in the Record of the Appellate Division). The petitioner's appearance in response to the subpoena was adjourned several times at the request of his counsel. There followed the litigation which ultimately gave rise to the petitioner's instant application for a Writ of Certiorari. For purposes of convenient reference, we shall treat with the litigation in the courts below as Proceeding No. I

* By reason of attaining the statutory age limit, Mr. Justice Arkwright retired on December 31, 1958. In his place the Appellate Division has designated Supreme Court Justice Edward G. Baker to preside over the Additional Special Term.

and Proceeding No. II, respectively. The basic relief sought by petitioner in each proceeding was the same, namely, to vacate the aforesaid subpoena duces tecum. The question involved is also common to both proceedings. In what part of the Supreme Court shall the motion to vacate be returnable?

Proceeding No. I

The steps taken in sequence in this proceeding were:

(a) Petitioner's initial application was by order to show cause dated February 13, 1958, returnable in the Supreme Court of the Appellate Division, Second Department, for an order to vacate and set aside the subpoena duces tecum (Exhibit C in the Record of the Appellate Division). By cross-motion, the respondent Hurley moved to dismiss the petitioner's motion to vacate the subpoena, contending that such motion should have been addressed, in the first instance, to the Additional Special Term (Exhibit D in the Record of the Appellate Division).

(b) By decision and order, both dated March 5, 1958, the Appellate Division granted the cross motion and dismissed petitioner's motion to vacate the subpoena "without prejudice to his right, if so advised, to renew his motion in the Supreme Court". The court also noted that while it "undoubtedly possesses original jurisdiction to entertain and determine, in the first instance, any motion in an action or proceeding pending in the Supreme Court," the court concluded that "orderly procedure and the interests of justice would require that petitioner's application be made in the first instance to the Supreme Court." *Matter of Anonymous (No. 1)* v. *Hurley*, 5 App. Div. 2d 872.

(c) On March 10, 1958, in compliance with the aforesaid decision and order, the petitioner renewed his motion

at the Additional Special Term of the Supreme Court where the subpoena by its terms was returnable. During the pendency of the motion, petitioner applied to Mr. Justice Arkwright, presiding at the Additional Special Term, that he refer the motion to Special Term, Part I, of the Supreme Court. Although Mr. Justice Arkwright reserved decision on the application, the petitioner thereupon withdrew his pending motion and brought on another motion to vacate the subpoena. This motion was by order to show cause, dated March 22, 1958, returnable before the court presiding at "a Special Term, Part I, of the Supreme Court, Kings County" on April 1, 1958. Respondents Arkwright and Hurley then cross-moved at the same Special Term, Part I of the Supreme Court for an order referring petitioner's motion to vacate to the Additional Special Term. The cross-motion was argued before Mr. Justice Hart, presiding at the Special Term, Part I on April 7, 1958 (Exhibits H to M, inclusive, in Record of Appellate Division). By opinion dated April 28, 1958 and order entered thereon dated April 29, 1958, Mr. Justice Hart denied the cross-motion (Exhibits N and O in Record of the Appellate Division).

(d) Respondents then appealed to the Appellate Division, Second Department, from the said order of Mr. Justice Hart, and petitioner moved to dismiss respondents' appeal (Exhibits P to S, inclusive in Record of Appellate Division).

(e) In an opinion, and order entered thereon, both dated May 29, 1958, the Appellate Division dismissed respondents' appeal on the ground that since the orders appealed from "relate to a matter of procedure it may not be said that they affect any substantial right of appellants, and, hence, no appeal lies from such orders". *Matter of Anonymous (No. 1)* v. *Hurley*, 6 App. Div. 2d 723, 724. The Appellate Division then made clear its views that all motions affecting subpoenas or other process issued out of

the Additional Special Term were to be addressed to and made returnable before the justice presiding at the said Additional Special Term of the Supreme Court.

With reference to its prior decisions upon the subject dated March 5, 1958 (Appendix A hereof), the court went on to say that in relegating the parties to the Supreme Court "we failed to insert the qualifying words 'Additional Special Term of the' before the words 'Supreme Court'. To rectify this inadvertence the Appellate Division, on its own motion, corrected its prior decisions accordingly, *nunc pro tunc*, so that there would be no doubt "that the power to quash a subpoena issued out of the Additional Special Term is an incident of the exclusive powers vested in the said Additional Special Term by the order appointing it". We quote from the opinion of the Appellate Division:

> "* * * we deem it advisable to elaborate upon our views as to the proper practice with respect to motions affecting subpoenas or other process issued out of the said additional Special Term, and to correct an inadvertent error in our two prior decisions upon the subject (Matter of Anonymous No. 1 [Hurley], 5 App. Div. 2d 872; Matter of Anonymous No. 3 [Hurley], 5 App. Div. 2d 872). In those decisions we dismissed motions made in this court to quash subpoenas issued out of the said additional Special Term on the ground that this court, while it possessed jurisdiction, nevertheless would not entertain such motions in the first instance, and that such motions should be addressed to the 'Supreme Court.' Our intention, however, was to state that such motions should be addressed to the said additional Special Term of the Supreme Court. This court, by its order of January 21, 1957, appointed that additional Special Term. Under said order it was only that additional Special Term which was authorized to conduct this judicial inquiry 'with full power to compel the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records.' Inadvertently, however, in

our decisions of March 5, 1958, when we relegated the moving parties there to the Supreme Court, we failed to insert the qualifying words 'additional Special Term of the' before the words 'Supreme Court.' To rectify the inadvertence, this court on its own motion will correct its said decisions accordingly, nunc pro tunc. It is obvious that the power to quash a subpoena issued out of the additional Special Term is an incident of the exclusive powers vested in the said additional Special Term by the order appointing it. Therefore, it would be inappropriate and improper for a justice presiding at another Special Term to review the propriety of the action taken by the justice at the said additional Special Term or to attempt to annul or confirm any such action. By our prior decisions we never intended that such a result should eventuate."

Consistent with its opinion, the Appellate Division made an order on May 29, 1958 amending its prior opinion and order dated and entered March 5, 1958 (Exhibit V in the Record of the Appellate Division).

(f) Following the Appellate Division's opinion of May 29, 1958, the attorneys for the respective parties conferred with Mr. Justice Hart, who properly stated that in view of the said opinion and order entered thereon, the motion to quash the subpoenas was required to be referred to the Additional Special Term and petitioner was granted until June 23, 1958 to institute such proceedings as he may be advised "to challenge the legality of the said order of the Appellate Division dated May 29, 1958 amending its order and decision of March 5, 1958 *nunc pro tunc*" (Paragraphs 22 and 23 of petitioner's petition to Appellate Division in the Record of the Appellate Division).

Petitioner thereupon embarked on the institution of still another proceeding which we have designated as Proceeding No. II.

Proceeding No. II

Upon a petition verified June 18, 1958, petitioner instituted a proceeding under Article 78 of the Civil Practice Act in the Appellate Division for an order prohibiting the respondent, Mr. Justice Hart, from referring petitioner's motion to vacate the subpoena duces tecum to the Additional Special Term, and directing the said respondent to render a decision upon the said motion "upon the ground that the said duty is specially enjoined by law upon the respondent."* We here point out that although the petition is ostensibly in the nature of prohibition and mandamus, it is in reality a certiorari to review the determination and order of the Appellate Division made May 29, 1958 which was the culmination of "Proceeding No. I" above.**

By decision (6 App. Div. 2d 894) and order entered thereon, dated July 21, 1958, the Appellate Division unanimously denied petitioner's application and dismissed his petition in the Article 78 proceeding. By order dated October 6, 1958 the Appellate Division denied leave to petitioner to appeal to the Court of Appeals (N. Y. Law Journal, Oct. 7, 1958, p. 14, col. 4).

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* The petition with its voluminous exhibits comprises part of the Record of the Appellate Division herein.

** On June 24, 1958 petitioner moved in the Appellate Division, Second Judicial Department, to transfer the Article 78 Proceeding to an adjoining Judicial Department for hearing and determination. The motion was denied by unanimous order of the court dated July 21, 1958 (N. Y. Law Journal, July 22, 1958, p. 3, col. 3). By order dated October 6, 1958 the Appellate Division denied petitioner's motion for leave to appeal to the Court of Appeals (N. Y. Law Journal, October 7, 1958, p. 14, col. 4). No application was made by petitioner to the Court of Appeals for leave to appeal to that court. Thus, this feature of the controversy is not properly before this court in that the petitioner failed to exhaust the remedies available to him for review accorded by state procedure. *Matthews* v. *Huwe*, 269 U. S. 262, 265-266; *Stratton* v. *Stratton*, 239 U. S. 55.

By order dated November 13, 1958, the Court of Appeals denied petitioner's motion for leave to appeal to that court (5 N. Y. 2d 708).

There followed petitioner's application to this court for a Writ of Certiorari.

ARGUMENT

The constitutional question presented is neither substantial nor ripe for review by this Court.

(1)

The power of the Appellate Division to appoint the Additional Special Term.

Both by the provisions of the New York State Constitution and the Judiciary Law of the State of New York, the Appellate Division has been granted plenary power to regulate the holding of special terms of the Supreme Court and to assign the justices to preside over such terms. We quote from Article VI, § 2 of the New York State Constitution:

> "The justices of the appellate division in each department shall have the power to fix the times and places for holding special and trial terms of the supreme court held therein and to assign the justices in the departments to hold such terms; or to make rules therefor."

The above quoted provision in the State Constitution is repeated *haec verba* in Section 86 of the Judiciary Law.

To complement the foregoing, Section 83 of the Judiciary Law grants the Appellate Division "the power to adopt, amend or rescind any rule of civil practice not inconsistent with any statute; * * * to adopt, amend or rescind any special rule for such department not inconsistent with any statute or rule of civil practice."

Thus, the Appellate Division's order of January 21, 1957, as amended, was a valid exercise of the power delegated to the Appellate Division to designate "an Additional Special Term of the Supreme Court" and to appoint the justice to preside over it. As an incident both of its own power and of the power of the Additional Special Term, the Appellate Division made clear in its opinion of May 29, 1958, pages 7, 8, *ante*, that motions to quash subpoenas issued out of the Additional Special Term should be addressed to the said Additional Special Term and not to any other special term of the Supreme Court. There is nothing at all unusual about such a procedure. Indeed, it is completely consonant with the procedure established by the Appellate Division as to other motions in special type proceedings. Thus, all applications in condemnation and tax certiorari proceedings are heard in Special Term, Part IV (Supreme Court, Kings County, Rule 20). Matrimonial matters are heard in Special Term, Part V (*Id.*, Rule 21, subd. a). Certain motions arising from incompetency proceedings are heard in Special Term, Part VI (*Id.*, Rule 22, subd. b).

So too with the Judicial Inquiry. It is a proceeding of a special type or nature. In the County of Kings there has not been such an inquiry or investigation since 1928. Just as the other special type proceedings illustrated above, by their very nature are returnable at a special term of the Supreme Court designated by the Appellate Division, so too has the Appellate Division in the exercise of its supervisory powers over the procedure and business of the Supreme Court, Kings County, deemed it administratively advisable to have motions affecting subpoenas issued by the Judicial Inquiry returnable at the Additional Special Term.

From all of the foregoing it is obvious to us that the decision as to which particular special term in the first instance shall decide the petitioner's motion to vacate the

subpoena and kindred motions rests solely in the province of the Appellate Division. Nor can it be logically argued that the Appellate Division has improvidently exercised its grant of power. Lines of authority so essential to the symmetry of our judicial system would be, dangerously short circuited if a judge sitting in one part of the Supreme Court could restrict, and even revoke, the action of another judge of equal and like authority, sitting in another part of the same court. *Beeber* v. *Empire Power Corp.*, 260 App. Div. 68, 69.

(2)

The litigation in the courts below was confined to procedural matters devoid of any substantial constitutional question; there is not the requisite finality for review by this court.

In the light of the foregoing, we turn to an analysis of our intentionally complete recital of the litigation in the state courts. This much is clear. All of the legal skirmishes, and indeed every facet of the litigation in the courts below, were confined to matters *procedural* in nature. In Proceeding No. I, referred to at page 5 *et seq. ante*, the objective of the petitioner was to obtain a determination of his motion to quash a subpoena in a term of the Supreme Court other than the Additional Special Term designated by the Appellate Division. His asserted constitutional right to have his motion determined at a different judicial forum than the Additional Special Term was unanimously rejected by the state courts. Nevertheless, in Proceeding No. II, referred to at page 9 *et seq. ante*, through the guise of an alleged mandamus or prohibition proceeding under Article 78 of the Civil Practice Act, he raised in substance the very *procedural* question that had already been determined adversely to him in Proceeding No. I. Accordingly, both the Appellate Division and the Court of Appeals of the State of New York unanimously rejected petitioner's contentions, without opinion. Implicit in the decisions of the state courts is the holding that petitioner's contentions are bereft of any constitutional prop because they deal only with matters of procedure.

From our discussion thus far, we deduce the proposition that in an appellate sense, the determinations and orders of the courts below are not final since they do not finally and completely determine the case or the substantive rights of the parties. Accordingly, on that ground alone, we submit that certiorari should be denied.

As was stated by this court in *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 546, in construing the "final judgment" requirement for certiorari,

> "It frequently has been said that for a judgment of an Appellate Court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties."

And such judgment, it has often been held, must be more than a determination of "merely interlocutory or intermediate steps." *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548, 551.

See also:

Republic National Gas Co. v. *Oklahoma*, 334 U. S. 62, 67-69;
Catlin v. *United States*, 324 U. S. 229, 233.

For a situation that is quite analogous to the case at bar, we respectfully refer the court to *Cobbledick* v. *United States*, 309 U. S. 323, 327, 328, wherein this court held that an order of a district court denying a motion to quash a subpoena duces tecum did not meet the test of "finality" requisite to review. See also *Alexander* v. *United States*, 201 U. S. 117, 121-122.

To the foregoing we would add that the jurisdiction and procedure of local courts is traditionally a matter of state policy with which this court declines to interfere.

Pacific Gas Co. v. *Police Court*, 251 U. S. 22, 24;
St. Louis Iron Mountain & Southern Railway Company v. *Taylor*, 210 U. S. 281, 285;

Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541, 551;
Kammerer v. *Koreger*, 299 U. S. 302, 304.

(3)

Petitioner's subsidiary contentions.

We need comment only briefly on some of the subsidiary contentions advanced by petitioner.

(a)

Petitioner's contention that the justice presiding over the Additional Special Term "was appointed investigator and prosecutor to conduct the Inquiry and also to adjudicate in a judicial capacity all matters in difference between himself as investigator and those persons appearing before him" (Petition, pp. 15, 16), is based upon a misconception of the facts and the law. Both under Section 90 of the Judiciary Law and under the order of the Appellate Division dated January 21, 1957, which was drawn in conformity with Section 90, the justice presiding at the Additional Special Term is not the prosecutor.

The cases cited by petitioner for the proposition that "to permit the Justice conducting the Judicial Inquiry to sit in review of his own act would constitute a denial of due process under the Fourteenth Amendment to the Federal Constitution" (Petition p. 16), are in no wise applicable to the proceeding at bar. Thus, we are not here concerned with a judge sitting as a trial justice over a complaint which he initiated while sitting as a "one-man grand jury," *Matter of Murchison*, 349 U. S. 133; or a party sitting as arbitrator in his own dispute, *Matter of Cross & Brown Co.*, 4 App. Div. 2d 501; or a judge hearing a motion alleging his own misconduct, *People ex rel. Todd* v. *Steinbrink*, 249 App. Div. 760. Rather, we are here concerned merely with an order of the Appellate Division whereby all proceedings in connection with the Judicial In-

quiry were remitted to the Additional Special Term, grounded upon the reasonable and time-honored rule that where a court has been granted jurisdiction over a particular matter it has jurisdiction over any incidental motions pertaining thereto.

(b)

Petitioner's reference to Section 19 of Article VI of the New York State Constitution (Petition, p. 17) is inapposite and unavailing. The intent of Article VI, Section 19 is apparent from a reading of former Section 3, the predecessor section, which forbade a judge to "sit in the Appellate Division or in the Court of Appeals in review of a decision made by him or by any court of which he was at the time a sitting member." (See *Duryea* v. *Traphagen*, 84 N. Y. 652; *Van Arsdale* v. *King*, 152 N. Y. 69, 71). Accordingly, Section 19 simply prohibits, for example, a Supreme Court justice, upon his promotion to the Appellate Division, to sit in review of one of his own decisions made by him while he was in the Supreme Court. It would also preclude a justice of the Appellate Division who was elevated to the Court of Appeals from sitting in review of a case in which he participated while a member of the Appellate Division.

We make the flat statement that in the case at bar there has been no contravention whatsoever of the above provision.

And as has been noted, page 5 *ante*, petitioner's motion in the Appellate Divisic : to vacate the subpoena duces tecum was dismissed because the Appellate Division refused to exercise its original jurisdiction in the matter and sit as a Special Term.

(c)

At pages 14 and 15 the petitioner is concerned lest any determination on the merits by the Additional Special Term of his motion to vacate the subpoena duces tecum would not be subject to review. Petitioner is inconsistent. He cites three cases (page 14) as authority for the proposition that

such an application to vacate a subpoena terminates in a final order from which an appeal may be taken as a matter of right. In any event, the short answer is that the petitioner is prematurely apprehensive and indulging in conjecture. Let the petitioner submit to a decision on the merits by the Additional Special Term and it will be time enough then to consider whether there has been any deprivation of petitioner's rights. *Parker* v. *County of Los Angeles*, 338 U. S. 327, 332. We observe also that "it is not impossible that the parties now complaining may be satisfied with the judgment which they may in the end be able to secure in the state courts." *Kimball* v. *Evans*, 93 U. S. 320, 321.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

March 10, 1959.

Respectfully submitted,

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MICHAEL A. CASTALDI,
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ZEVIE B. SCHIZER,
With them on the Brief.

FILE COPY

Supreme Court, U.S.
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MAR 17 1959
JAMES R. BROWNING, Clerk

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Respondents.

PETITIONER'S REPLY BRIEF

DAVID F. PRICE
Counsel for Petitioner
66 Court Street
Brooklyn, New York

IN THE

Supreme Court of the United States

OCTOBER TE[illegible] 1958

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Respondents.

PETITIONER'S REPLY BRIEF

Petitioner respectfully calls attention to the significant fact that the true respondent, Honorable Walter R. Hart, a Justice of the Supreme Court of the State of New York, has not opposed petitioner's application.

The intervening respondents, Hon. George A. Arkwright and Denis M. Hurley, counsel for the Judicial Inquiry, misconstrue the nature of petitioner's application.

The petitioner does not seek to review an order denying a motion to quash a subpoena duces tecum.

Instead he seeks to review an order of the Appellate Division of the Supreme Court dismissing on the merits petitioner's application under Article 78, Civil Practice Act, for an order directing a justice of the Supreme Court to decide a motion regularly and properly pending before him.

By Section 1300, Civil Practice Act, such an order is a final order which finally determines the rights of the parties. The said section provides:

> "FINAL ORDER. The court shall render a final order granting the petitioner the relief to which it deems he is entitled, or dismissing the proceeding, either on the merits or with leave to renew. * * *"

Here the proceeding was dismissed on the merits. Consequently *Cobbledick* v. *United States,* 309 U. S. 323, and *Alexander* v. *United States,* 201 U. S. 117, are inapplicable.

Petitioner's position is similar to that of the petitioner in *Perlman* v. *U. S.,* 247 U. S. 7. The only remedy available to the petitioner to "avert the mischief" of the Appellate Division's order dismissing the Article 78 proceeding is an appeal to this Court.

It is argued, on page 14 of the brief of the intervening respondents, that petitioner's contention that Mr. Justice Arkwright was appointed investigator and prosecutor to conduct the Judicial Inquiry, is based upon a misconception of the law and facts.

We submit that the order directing the Judicial Inquiry is a complete answer to this argument.

The order (Exhibit A) annexed to the Appellate Division papers, provides:

> "ORDERED, *that such inquiry and investigation shall be conducted by the Honorable George A. Arkwright,* a Justice of the Supreme Court, at a Special Term of the Supreme Court, County of Kings, with full power to compel attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records; * * *"

Also:

> "ORDERED, that Denis M. Hurley, Esq., an attorney and counselor-at-law, of 32 Court Street, Brooklyn, New York, who has been duly designated by the Brooklyn Bar Association, be and he hereby is designated *to aid the said Justice in the conduct of said inquiry and in the prosecution of said investigation,* pursuant to the provisions of the Judiciary Law (Section 90, subdivisions 6 and 7), * * *."

The foregoing provisions of the Appellate Division order are a clear demonstration that the Justice conducting the Judicial Inquiry is a "prosecutor" within the accepted meaning of the word.

Intervening respondents also misconstrue petitioner's contention that, to relegate him to the Additional Special Term for the determination of his application to quash the subpoena duces tecum would deprive him of the equal protection of the law.

Normally an application to quash a subpoena duces tecum results in a final order which is appealable.

However, as was pointed out, on page 15 of petitioner's main brief, the Appellate Division has specifically held that such an order if made by the Additional Special Term would not be appealable. In *Matter of C Anonymous,* Oct. 7, 1958, it was said by the Appellate Division, Second Department:

> "* * *. The Judicial investigation in which the order was made is neither an action, civil or criminal, nor a special proceeding (cf. People ex rel. Karlin v. Culkin, 248 N. Y. 465; Matter of Brooklyn Bar Ass'n., 223 App. Div. 149, 151). In the absence of statutory authority, the order is not appealable. * * *."

Therefore no appeal would lie from an order of the Additional Special Term deciding the application. Clearly such a result would violate petitioner's constitutional rights.

Dated: March 16th, 1959.

Respectfully submitted,

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